Editor's note: 79 I.D. 599

FOSTER MINING AND ENGINEERING COMPANY

IBLA 70-669 Decided September 22, 1972

Appeal from decision of Riverside, California, district and land office, Bureau of Land Management, declaring lode mining claims void ab initio in part.

Affirmed.

Mining Claims: Generally -- Rules of Practice: Appeals: Standing to Appeal

A transferee of a mining claim declared void ab initio by a decision of the Bureau of Land Management has standing to appear before the Board of Land Appeals in an appeal proceeding from that decision.

Administrative Procedure: Hearings -- Mining Claims: Hearings -- Rules of Practice: Hearings

In a Departmental proceeding to determine the validity of a mining claim, an evidentiary hearing under the Administrative

Procedure Act is required only if there is a disputed determinative question of fact; where the validity of a claim turns on the legal effect to be given to facts of record determining the status of the land when the claim was located no hearing is required.

Mining Claims: Hearings -- Mining Claims: Lands Subject to -- Mining Claims Rights Restoration Act -- Rules of Practice: Hearings -- Withdrawals and Reservations: Power Sites

Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void ab initio without a hearing.

Mining Claims: Lands Subject to -- Mining Claims Rights Restoration Act -- Notice -- Public Records

Notice on public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws.

Federal Employees and Officers: Authority to Bind Government --
Mining Claims: Lands Subject to -- Notice

A failure of Government officials to provide information that land was closed to mining locations cannot give life to invalid mining claims.

APPEARANCES: William B. Jacobs, President, Foster Mining and Engineering Company; Monta W. Shirley, Attorney for Ramsher Mining and Engineering Corporation; Evelle J. Younger, Attorney General, Sanford N. Gruskin, Chief Assistant Attorney General, and Edwin J. Dubiel, Deputy Attorney General, Attorneys for the State of California.

OPINION BY MRS. THOMPSON

This appeal by the Foster Mining and Engineering Corporation (hereafter referred to as Foster) is from a June 11, 1970, decision by the Riverside, California, district and land office, Bureau of Land Management, declaring its ten lode mining claims, the Summit Alpha Nos. 30-33, 42-46, and 64, to be void ab initio as to those portions of the claims lying within section 9 and the W 1/2 SW 1/4, SW 1/4 SW 1/4 NW 1/4, section 10, T. 2 N., R. 4 W., S.B.M., California. The decision found the lands were withdrawn under section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970), when the claims were located on September 10, 1965, and were not opened

to mineral entry under the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1970), because they are excepted under the third proviso of the Act, being within a preliminary permit (Project No. 2426, the California Aqueduct Project) issued by the Federal Power Commission to the Department of Water Resources of the State of California, effective July 1, 1964. The decision also noted that the permittee had filed an application to license the project with the Federal Power Commission on December 15, 1965.

By order of this Board the State of California was designated an adverse party and afforded an opportunity to answer Foster's appeal. A reply to the State's answer was filed by Ramsher Mining and Engineering Corporation (hereafter referred to as Ramsher). The State filed a motion to strike the reply on the ground there was no showing that Ramsher is a party in the matter and has standing to appear in this appeal proceeding. In response to this motion and also to a letter from this Board requesting the basis for Ramsher's appearance, Ramsher filed a copy of a deed from Foster to Ramsher executed February 22, 1971, and recorded March 10, 1971, conveying certain unpatented mining claims, including those in question. In view of this showing that Ramsher has an asserted interest in the mining claims in question, it has standing to enter its appearance as a party in this appeal proceeding. Therefore, the State's motion to strike Ramsher's reply is denied.

Foster generally alleges that it located the claims in good faith, there was no record the land was withdrawn, and it has paid county taxes and has performed assessment work on the claims for five years without any notice to it of any adverse claims. It states that "the facts in this case do not make the decision of The Dredge Corporation, 64 I.D. 368 (1957) applicable and claim that a hearing should have been held in this matter and that since no hearing was held, this decision is in itself null and void." It requests a hearing. 1/ Other than the general statement quoted above, the only other reason offered for a hearing is its statement that

> . . . interoffice communications or preliminary permits or applications for license not made official or a part of the public record are not sufficient to void their legal right to said mining claims.

Ramsher also contends, in effect, that the claims may not be declared void without a hearing. It contends that if a hearing had been afforded it could have shown that the State's preliminary permit was issued subject to conditions which were never fulfilled and, therefore, the permit had expired. It contends there was a lack of due process in not affording the mining claimant opportunity for a hearing, and also that there was no notice of the permit on file with the land office at the time the claims were located.

1/ Foster also contended that regulations quoted in the decision do not apply. The only regulations referred to in the decision were those pertaining to its right of appeal from that decision.

The primary issue raised by Foster and Ramsher is whether a hearing is necessary to fulfill the requisites of due process before these claims may properly be declared invalid. In the Dredge case cited by appellants and in the decision below, it was stated, at 64 I.D. 375:

> Here the appellant could have acquired no right in the land because it was under lease to third parties, segregated from the public domain, and not open to location. It is well settled that a locator does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation. See El Paso Brick Co. v. McKnight, 233 U.S. 250 (1914); Brown v. Gurney, 201 U.S. 184 (1906), and Gwillim v. Donnellan, 115 U.S. 45 (1885). * * *

This holding was affirmed in a supplemental decision in the same case at 65 I.D. 336 (1958). There the Department enunciated more fully the test used in determining when a hearing is available, to wit:

> * * * The petitioner seems to be under the impression that the validity of any mining location must be tested at a hearing, meaning a hearing at which the parties may appear and present evidence. * * *
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> * * * Almost from time immemorial the Department has observed a clear distinction between cases where the validity of a mining claim turns on the legal effect to be given to facts of record (a question of law) and cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). Id., at 338.
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> * * * In short, for well over 50 years and probably much earlier, the Department has followed two distinct procedures in determining the validity of mining claims, holding hearings in cases turning on questions of fact and not holding hearings in cases turning on questions of law. Id., at 339.

Both of these decisions were affirmed in Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966), where the court, at 890, indicated that when the mining claimant does not specify issues which require a hearing, there is no "prejudicial disregard of the hearing requirements of the Administrative Procedure Act" (5 U.S.C. § 551 et seq. (1970)).

Thus, appellant's contention that the Dredge Corporation cases do not apply in the instant case lacks merit, for the standards required for an evidentiary hearing under the Administrative Procedure Act in determining the validity of a mining claim are clearly established. Only if there is a disputed determinative question of fact does a claimant have the right to such a hearing. See also, United States v. Consolidated Mines & Smelting Co., Ltd., et al., 455 F.2d 432, 453 (9th Cir. 1971).

The only issues which appellants specify to support their request for a hearing are the State's alleged noncompliance with the terms of the preliminary permit and the lack of notice of the State's preliminary permit on the land office records. Do these general allegations raise questions of fact which must be resolved by an

evidentiary hearing under the Administrative Procedure Act? The answer must be no. The determinative issue in this case is whether the lands were open to entry under the mining laws (30 U.S.C. § 21 et seq. (1970)) when the claims were located. It is clear from the Dredge cases that where the validity of a mining claim turns on the legal effect to be given to facts of record establishing the status of the land when the claim was located no hearing is required.

As to the alleged noncompliance of the State with the terms of the preliminary permit, Ramsher asserts that the State's permit had expired when the claims were filed because the State had failed to perform the conditions of the permit.

From information furnished by the State and the Federal Power Commission in this case record, it is apparent that the State filed its application for a preliminary permit with the Federal Power Commission on November 14, 1963, and the permit was granted by order of the Commission for a term of 36 months on July 16, 1964.

Section 5 of the Federal Power Act provides that preliminary permits "may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing". 16 U.S.C. § 798 (1970). It is a matter of public record shown on the official records of the Commission, of which we may take notice, that at the

time the mining claims were located in 1965, the permit was in effect, and the permit was never canceled by the Commission. Ramsher's offer to tender evidence at a hearing in this Department as to alleged non-compliance by the State with the terms of its permit is simply specious at this late date as made to an agency which had no jurisdiction over the permit.

We come now to the question of the effect of the preliminary permit upon the status of the land and the question of notice. From the record before us, it does not appear that there was any notation on the land office records of the State's preliminary permit at the time the mining claims were located in 1965. However, it appears that there was other public notice of the preliminary permit application. In Exhibit F of the permit application the federal lands involved in the proposed project are listed by legal description. Notice of the application describing the proposed project generally was published in the Federal Register (29 F.R. 368, January 15, 1964), and in local newspapers. Although those notices did not list the legal description of the federal lands affected thereby, they listed the counties where the lands were and also indicated that the application was available for public inspection in the offices of the Federal Power Commission.

The Commission found that the publication of the notices met the requirements for notice of the preliminary permit application

specified in section 4(f) of the Federal Power Act, 16 U.S.C. § 797(f) (1970), which authorizes the Commission to grant such permits, as provided by section 5 of the Act, 16 U.S.C. § 798 (1970), for the "sole purpose of maintaining priority of application for a license * * *." On page two of its order of July 16, 1964, issuing the preliminary permit, the Commission stated:

> (2) Public notice of the filing of the application has been given as required by the Act. No protests or petitions to intervene have been received. No conflicting application is before the Commission.

As to the effectiveness of the permit, there is no merit to any contention of insufficient notice of the application for the permit.

The effect of the filing of the application for a preliminary permit as to the status of public land included therein is the same as the filing of the application for a license for a proposed power project. It is provided by section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970), that any lands of the United States included in any proposed project under the Act

> * * * shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [C]ommission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of

> the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. * * *

It has been the practice of the Department when the Federal Power Commission has sent notice of the filing of an application for a preliminary permit or a license to the land office to note the land office public land status records to show a withdrawal of the land as of the date of the filing of the application with the Commission. See Instructions, 51 L.D. 613 (1926). The rules of the Commission provide that notice of preliminary permits will be given to the appropriate office of this Department as to the public lands affected "so that withdrawals from entry may be recorded". 18 CFR 4.81. Apparently in this case notice of the permit application and of the license application was not sent to the land office and, therefore, no notation was made upon the land office records as of the time the claims were located. Although section 24 of the Federal Power Act quoted above provides that notice of applications "shall be filed in the local land office", it does not expressly require that notation of the application be made on the land office records nor is the effective date of the withdrawal or segregation the date notice of the application is filed in the land office. Instead, it expressly provides that "from the date of filing of application therefor" the lands are reserved "until otherwise directed by the [C]ommission or by Congress". The filing of the application is with the Commission and this Department has no authority to declare the lands open to location, entry, or selection

unless the Federal Power Commission makes the determination that the lands should be opened or Congress so provides. Nevada Irrigation District, 52 L.D. 371, 376, approved on rehearing, 52 L.D. 377 (1928).

There is nothing in this case to indicate that the Commission determined these lands should be open to entry. This leads us to the Congressional enactment pertinent here, namely, the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1970), which declared public lands within powersite withdrawals to be open to location under the mining laws subject to a reservation of power rights to the United States. The third proviso of the first paragraph, however, governs here. It provides, in part:

> * * * That nothing contained herein shall be construed to open for the purposes described in this section any lands * * * (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

Thus, Congress has provided that public lands within preliminary permits granted by the Federal Power Commission are not open to mining location. If mining claims are located when the lands are within a preliminary permit issued by the Commission, the claims are void ab initio. A. L. Snyder, et al., 75 I.D. 33 (1968). Furthermore, the

filing of an application for a license while the permit was in effect "kept the land 'under examination and survey by a prospective licensee of the Federal Power Commission' within the meaning [of the above quoted proviso] since it was filed before the permit expired and preserved the priority of the permittee under the permit." Id. at 36; C. A. Anderson, A-29999 (March 23, 1964); Francis N. Dlouhy, A-28597 (May 18, 1962).

Because appellants' claims were located when the land was within the preliminary permit they must be declared null and void ab initio. The fact that notice of the application for the permit, the permit, and the application for a license was not made on the land office records of public land status, does not compel a contrary conclusion. Congress may provide for the appropriation or withdrawal of public lands as it sees fit "with or without notice, at least prior to the time that private rights had vested". Lutzenhiser v. Udall, 432 F.2d 328, 331 (9th Cir. 1970). No notice on the land office records has been prescribed here. No rights vested in the claimants where the lands were already appropriated under the preliminary permit. It is not essential that a permit be made a matter of record on the land office records at that time to have segregative effect under the law. Cf. United States v. Schaub, 103 F. Supp. 873, 875 (D. Alaska 1952), aff'd, Schaub v. United States, 207 F.2d 325 (9th Cir. 1953). We may note that lack of notice on the records of this Department of other appropriations of public lands under Congressional enactments

is not fatal to their effectiveness where not expressly required by Congress. The most obvious example of such an appropriation would be a valid mining claim for lands open to location perfected under the mining law, yet the land office records will not reveal its existence.

Furthermore, any failure of Government officials to provide information that land was closed to mining cannot give life to invalid mining claims. Leslie G. and Rita M. Folwell, A-31104 (August 18, 1969). This principle is applicable here. 2/

Because our determination that the claims are invalid must be based on facts which may be officially noticed and there are no genuine factual disputes here as the determinative issues are resolved by legal conclusions reached above, appellants' request for a hearing is denied.

2/ Although, as indicated above, the lack of notice of the preliminary permit application, permit, and license application, upon the land office records does not give life to these mining claims, we do not sanction the inadvertent failure to provide the public with this information. We urge the Bureau of Land Management to seek cooperation from the Federal Power Commission to assure that information from that Commission which will affect public land status will be timely furnished to the Bureau so that notation may be made on the public land status records for the public's information.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Member

We concur:

Douglas E. Henriques
Member

Edward W. Stuebing
Member